No. 21818

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA and CALIFORNIA STEVEDORE & BALLAST COMPANY,

Appellees.

BRIEF FOR THE UNITED STATES

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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JURISDICTIONAL STATEMENT

This is an action to recover damages for personal injuries allegedly sustained by Appellant longshoreman while working in the hold of Appellee's vessel. Jurisdiction exists under the Public Vessels Act, 46 U.S.C. §§781 et seq., and 28 U.S.C. §1291 by reason of Appellant's Notice of Appeal filed on March 21, 1967, after final judgment and order denying motions under Rules

52(b) and 59 of the Federal Rules of Civil Procedure.

COUNTERSTATEMENT OF THE CASE

1. The Facts

The facts of this case are essentially embodied in the District Court's findings of fact. Appellant has for the most part accurately stated the salient facts in his opening brief, with the glaring exception that the trier of fact could not make a finding, from the evidence submitted, that the pallet board did in fact break.

Briefly, Appellant is a longshoreman who was working in the No. 2 hold of the Government vessel, PVT. JOSEPH F. MERRELL. He was part of an eight man gang stowing boxed ammunition into the wings of the hold. Because of a so-called four on, four off system, only four of the eight men were working at the time of Appellant's alleged injury. As a result, Appellant was obliged to drive the fork lift truck, raise a fully loaded pallet to a level of seven to nine feet, leave the seat of the truck, climb up

on the forks, and scramble across the raised pallet to hand stow the boxes of ammunition. All this, while the four "off duty" longshoremen, gazed on.

Appellant alleges that the pallet board broke, thereby causing his fall. There were no eyewitnesses.

Appellant brought his action in the district court alleging negligence of the United States and unseaworthiness of MERRELL.

2. The District Court Decision

After considering the evidence, Judge Wollenberg concluded that Appellant's evidence failed to establish that the United States was negligent or that MERRELL was unseaworthy. The sole causes of the accident were held to be Appellant's own actions in engaging in the four on, four off system and in leaving the driver's seat of the fork lift truck with a loaded pallet board suspended in the air. Consequently, the United States was held "entitled to a dismissal" of Appellant's action below.

ARGUMENT

THE DISTRICT COURT'S FINDINGS THAT THE UNITED STATES WAS NOT NEGLIGENT AND THAT MERRELL WAS NOT UNSEAWORTHY ARE NOT CLEARLY ERRONEOUS.

A. The "Clearly Erroneous" test governs this Court's review of the District Court's findings.

The standard governing review in this Court of the District Court's findings of fact is so well established as to require little discussion or citation. In the leading case of McAllister v. United States, 348 U. S. 19, 20 (1954), the Supreme Court stated the standard as follows:

> In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure.

Accord: States S. S. Co. v. Permanente S. S. Corp., 231 F.2d 82 (9 Cir. 1956); Admiral Towing Co. v. Woolen, 290 F.2d 641 (9 Cir. 1961). This standard applies, of course, to the review of the trial court's findings as to negligence and

proximate cause. E.g., Bartholomae Corp. v. United States, 253 F.2d 716, 720 (9 Cir. 1957); North American Van Lines v. Brown, 248 F.2d 905, 912 (8 Cir. 1957); Safe Harbor Enterprise, Inc. v. Hill, 301 F.2d 139 (5 Cir. 1962).

Under this test, a factual finding may be said to be "clearly erroneous" only when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". United States v. Oregon Medical Society, 343 U. S. 326, 339 (1952); United States v. United States Gypsum Co., 333 U. S. 364, 395 (1948). Because of its stringency, this test imposes on appellants what has been described by the Supreme Court as an "almost insurmountable burden." International Boxing Co. v. United States, 358 U. S. 242, 252 (1959). As we demonstrate in the following section of this brief, Appellant has failed to surmount that burden.

B. The District Court's findings are supported by the evidence.

The Court below did not and could not, based on Appellant's evidence, make a finding that the pallet board did in fact break. In short, the Court did not believe Appellant's story. He testified that the board broke and on several occasions demonstrated the manner in which it allegedly broke. The record indicates that the Court closely watched these demonstrations (T. 52, 64, 65). 1/ Appellant testified that he examined the pallet board before he stepped on it, and yet, when asked at trial whether the board in use at the time of the accident was an "Army board" (bigger and heavier than the board used at trial), he could not remember the type board used at the time of the accident (T. 59-60, 88-90). The record clearly shows that Appellant brought into court a decrepit and broken board in hopes, it is submitted, of influencing the trier of fact (T. 123-6).

Appellant's fellow longshoreman testified that he saw a broken piece of wood on the deck,

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1/ "T.", as hereinafter used, refers to the transcript of trial proceedings.

but denied that there was any other wood or dunnage to block the wheels of the fork lift (T. 113). By failing to find that the injury occurred as alleged by Adams, the Court inferentially disbelieved him.

A motion for a new trial was made, fully argued and denied. Further, the decision below was not rendered from the bench at the conclusion of trial, but rather at a later date after the trial court had had sufficient time to reflect upon and consider all the evidence and argument. By post trial briefs the Court was made aware of all possible ramifications of this matter and consciously chose to deny recovery.

Appellant now argues that the word "load" included in the provisions of Section 9.67 of the Safety and Health Regulations for Longshoring (29 C.F.R. Part 9) is not restricted to inanimate objects or cargo and urges that the provision imposes a standard of strict liability upon the shipowner or stevedore. Appellant's argument fails in two respects. First, he assumes that the pallet board broke. As noted

earlier, the district court made no such finding and it is just as probable, if not more so, that Appellant slipped off the pallet board. Second, while riding a pallet board on a fork lift truck may be a fact of life in longshoring, it remains that it "is not a cautious act" and can be considered as negligence. Overton v. Pope & Talbot, Inc., 296 F. Supp. 978, 980 (E. D. Pa. 1967). Appellant admitted that he considered using a ladder but decided that the use of a fork lift was safer since a ladder "could break" (T. 58).

Appellant would determine liability for a defective pallet board only after the fact. Does this mean that all reason is rejected and that a shipowner will be liable if four 200 pound longshoremen climb onto a fully loaded pallet on a fork lift truck? Does this further mean that a longshoreman can negligently balance at the edge of a pallet board and still be entitled to recovery from a shipowner if he is injured? The fallacy of Appellant's argument is obvious. Appellant failed to prove that the pallet board broke, and yet, in this Court, urges the

application of strict liability stemming from an alleged broken pallet board.

C. The findings of proximate cause embodied in findings 6, 7, and 8 are relevant.

Appellant seeks recovery from the United States based on claims of negligence and unseaworthiness. Any determination of negligence must, of course, include a finding of proximate cause. Therefore, the trier of fact was bound to look for the cause of the accident. Judge Wollenberg found that no conduct of Government employees or agents contributed to Appellant's injury, but rather that Appellant himself, by his own actions, solely caused his injury. It has been admitted throughout these proceedings that although eight men were available in the hold, only four were working at the time of Appellant's fall. If all eight men had been working, Appellant would not have had to leave his seat on the fork lift truck. Safety regulations specifically prohibit a lift driver, such as Adams, from leaving his vehicle unattended when it is in operation. An unattended vehicle must have its forks lowered and power

secured. Section 9.73(j) Safety and Health Regulations for Longshoring [Plaintiff's Exhibit 4]; Rule 1011 of the Pacific Coast Marine Safety Code [Defendant's Exhibit B]. Adams, however, left the driver's position with a loaded pallet raised seven to nine feet (T. 14, 95-96). He then compounded his error by scrambling up on top of the fully loaded pallet.

Nor is it any excuse to say that Adams was needed to help move cargo from the pallet to the wings since there was only one other man to do this work. The applicable union contract specifically provides in Section 10 that when cargo is hand stowed there must be four "serving men" and four "hold men" in addition to fork lift truck drivers. (International Longshoreman and Warehouseman's Union - Pacific Maritime Association Agreement, June 16, 1961 - July 1, 1966, [Defendant's Exhibit A]). Thus, there were, or should have been, an adequate number of men in the hold to handle the cargo without the necessity of Appellant's participation.

Appellant argues that every improper practice "had ceased or come to rest" by the time he stood on the pallet board. The trier of fact determined, and correctly so, that the United States was not negligent, and that Appellant negligently put himself in a dangerous position and thereby solely caused his own injury. The point is graphically illustrated in the case of Salmond v. Isbrandtsen Co., 1953 A.M.C. 1066 (S.Ct.N.Y. 1953). In that case, plaintiff longshoreman was unloading concrete ballast from a ship by the use of a crane and a truck. The plaintiff initially was on the cab of the truck in a position of safety. While the load of concrete was on the way up from the ship's hold, plaintiff left the cab of the truck and climbed over several large pieces of concrete in the truck. He then held up his hands to tell the winchman to hold the load. While the load was in the air, a large piece of concrete fell and hit the plaintiff. The court was unable to find any negligence on the part of the shipowner and denied recovery to the plaintiff, holding that

the negligence, if any, was that of the stevedoring company's foreman. Specifically, the court stated (1953 A.M.C. at 1069):

> In all actions for negligence the trier of fact must be able to place his finger and say, "There is negligence." It may not be left to speculation or remote possibility.

In the case at bar, like Salmond, the proximate cause of the accident was the longshoreman's own conduct in negligently placing himself in a position of danger.

D. The "four on, four off" system.

The instant case is of more than passing interest because of the intimate view provided of actual longshoring operations on the San Francisco waterfront. This view cannot help but prove disquieting. In regard to the four on, four off system, the District Court found it "self-evident" that such a system is little more than wholesale cheating by the longshoring gang which resulted in an insufficient number of men to safely do the work. (T.R. 146). 2/

Testifying below as to liability were three longshoremen, including Appellant. They had been

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2/ "T.R.", as hereinafter used, refers to the consecutively numbered pages of the pleadings which form the transcript of record herein.

employed as longshoremen in the Bay Area for 23 years, 23 years and 22 years respectively (T. 2, 48, 129). Each was an "A" member of Local 10 of the International Longshoreman and Warehouseman's Union, San Francisco. An "A" member has seniority rights, one of the prime benefits being the opportunity to take night work with its attendant increased hourly wages (T. 31, 106, 117). Appellant and Witness Victor were both working on the "plug" (T. 29, 50) which means they were not regular members of a gang, but free to choose from the available vacancies for the night's work.

The loading operation that night consisted of moving pallets laden with boxes of small arms ammunition from the place of landing in the hold to the wings by means of a fork lift truck. The pallet would then be raised by means of the fork lift until even with the tops of conax vans (rectangular metal vans loaded with cargo) already in place and the individual boxes moved by hand to their place of ultimate stow. Both wings of the ship were being loaded. In the lexicon of the trade, this was a "hand stow" operation which

required eight men in the hold assigned as follows:

2 men - drivers of the 2 fork lift trucks

2 men - remove bridles from pallet boards; attach bridles to empty pallet board

4 men - on top of conax vans to hand stow cargo (2 men per side)

In addition to regular breaks, not more than one man can be absent at a time for relief purposes. This man would be one assigned to handling the bridles in the square of the hatch. Each holdman or swingman is considered equal in skills and rotation of jobs would not be unusual. All of this is spelled out in some detail in Sections 10.2, 10.21 and 10.23 of the Pacific Coast Longshore Agreement(Defendant's Exhibit A). This was all well known to those in the trade, including Appellant (T. 117-119, 155-157, 164-165, 176-178).

Though eight holdmen were assigned to No. 2 hold on MERRELL, only four were working. As to the other four, Witness Victor stated (T. 28, 29):

The Court: Were they doing anything else besides just sitting around?

A. No.

At the end of every hour, the gang members would shift so that the time off was equalized.

As Appellant himself testified, ". . . we work one hour and we'd be off one hour." (T. 61). Needless to say, each gang member drew his full eight hours wage for the time on the ship even though he had only worked four hours (T. 41). This arrangement has been characterized as the four on, four off system.

Thus, at the time of the accident, Appellant and one other man were doing the work of four men. Adams would unhook the bridle from the pallet as it landed in the hatch. He would then mount the fork lift truck, move the pallet into the wing, raise the loaded pallet to the top of the conax vans, dismount to block the wheels of the fork lift, climb up to the top of the conax vans via the fork lift, and scramble across the raised load to assist in hand stowage of the boxes of small arms ammunition. His partner, who was unable to drive the fork lift truck, generally remained on top of the conax vans to assist in the hand stow (T. 54-55, 84-85). Adams was injured when he fell from the raised pallet load as he attempted to reach the cargo "table"

after clambering up the fork lift truck. (T. 52-53).

One of the more surprising features of the case was the determined attempt to justify use of the four on, four off system. It was stated that this has been a "custom" on the waterfront for the past twenty years which continues to this day (T. 11-12, 60-61, 63). Appellant contended that this practice was done with the knowledge of the gang boss, the immediate supervisor of the men, and that more cargo could be handled by using half the gang than by using the full gang (T. 12, 57, 63-64, 120). The witnesses denied that there was any rule prohibiting using the four on, four off system, although the union agreement was said to be the "bible" (T. 12, 106). It was urged that the union agreement did indeed tolerate such a practice (T. 126-127; Plaintiff's Supplemental Trial Brief, T.R. 118-9).

There is, of course, nothing in the Pacific Coast Maritime Agreement which in any way suggests that an employer must employ eight men in the hold to have four work. Kenneth B. Granstedt, a

California Stevedore and Ballast Company employee in overall charge of that company's contract operations at the Oakland Army Terminal, testified as to proper conduct of longshoremen. The four on, four off system is a practice not permitted under the union contract and contrary to direct instructions from the company (T. 179-181). When observed or brought to his attention, Mr. Granstedt stated that he immediately fires the offending gang (T. 181, 191).

One may well ask, then, how this particular gang, or any gang, can get away with this practice. Life on the waterfront has never been noted for its gentle ways. Night work in the Bay Area is almost solely the province of "A" men, those whose seniority to a large extent came from the ingress of workers during World War II (T. 117).

The Army does not supervise the longshoremen - the Government pays for stevedoring on a commodity tonnage rate which is completely independent of longshoremen's wages (T. 148-149). Both the gang boss (immediate supervisor of a gang) and the walking boss (overall supervisor

of entire cargo handling operations for a single ship) are members of the same local as are the individual longshoremen.

From a consideration of all these factors, it is submitted that in addition to being clearly fraudulent, the four on, four off system resulted in Appellant's having to scramble to the top of the load to assist in cargo stowage although there were sufficient personnel in the hold to accomplish the stowage.

E. The pallet board, even if it did break, would not render MERRELL unseaworthy.

The correct test of the duty to provide a seaworthy ship and appurtenances is set forth in Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 550 (1960):

> The duty is absolute, but is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness... (Emphasis added)

Judge Wollenberg found that the pallet board was reasonably fit for the purpose intended, i.e., safely supporting the load of small arms ammunition. (T.R. 145).

This is shown by the fact that it did not break when cargo alone was on the pallet.

The fact that a pallet board breaks (and here the District Court was unable to make such a finding) does not establish that the board was defective and the vessel unseaworthy. In Jefferson v. Taiyo Katun, K. K., 310 F. 2d 582 (5 Cir. 1962), a dunnage board which broke as a longshoreman walked on it did not render the vessel unseaworthy. And in Logan v. Empresa Lines, 353 F.2d 373, 377 (1 Cir. 1965), the First Circuit affirmed the trial court's denial of recovery to a longshoreman who:

> . . . did not produce any evidence which would compel the conclusion that the accident could only have occurred through a defect in the hatchboard . . .

Reed v. The Yaka, 183 F. Supp. 69 (E. D. Pa. 1960), relied on by Appellant to support his claim of unseaworthiness, is easily distinguishable. In that case there was no question but that the pallet board broke because of a defect in the wooden pallet as it was being used for staging. The use of the pallet as

staging was held to be proper. But in the case at bar there is neither a finding that the pallet board broke nor a finding that the board was being used in a proper manner.

It is well established in the Ninth Circuit that the warranty of seaworthiness does not extend to the negligent use by a longshoreman of a seaworthy appliance. Beeler v. Alaska Aggregate Corp., 336 F.2d 108 (9 Cir. 1964); Billeci v. United States, 298 F.2d 703 (9 Cir. 1962); Blassingill v. Waterman, 336 F.2d 367 (9 Cir. 1964). That the pallet was fit for its intended use was clearly brought out by Appellant's own testimony (T. 60):

> Q. When you looked at this board, did you see anything wrong with it?
>
> A. Looked good to me. Looked sufficient to me, because the cargo was on this pallet board, and the board looked good to me. Didn't look like no fault about it. I examined the board before I got on the board. Board looked good to me, because it had cargo on the board.

Appellant, therefore, must fail since the pallet board was found to be reasonably fit for its

intended use and Appellant failed to convince the trial court of negligence by the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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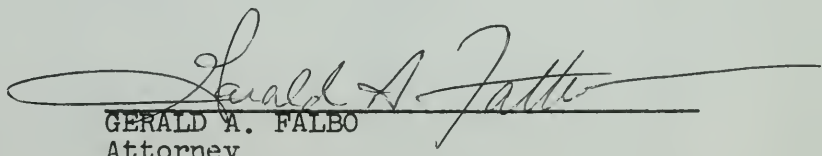
CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing brief is in full compliance with those rules.



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